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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

COLTON JAMES WHITE,

Defendant and Appellant.

F076187

(Super. Ct. No. F17902189)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Don Penner,
Judge.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kelly E.
LeBel, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Franson, J. and DeSantos, J.

Defendant Colton James White appeals from the trial court's order that he register as a sex offender. He contends the court did not consider the likelihood he would reoffend, and if it made an implied finding, it was not supported by substantial evidence. The People argue defendant forfeited the issue, and substantial evidence nevertheless supported an implied finding by the trial court. We affirm.

FACTS

In March 2017, 28-year-old defendant and a 14-year-old female (the victim) texted each other through a social media application called Whisper. The victim initially told defendant she was 16 years old, but eventually revealed she was only 14 years old. After more than a month of communicating, they agreed to meet.

Defendant drove to Reedley and picked up the victim down the street from her house. He drove to an orchard and parked. They got in the back seat. Defendant asked her if she was really 14 years old because she looked younger. She said she was 14. He put her hand on his penis and ask her if she "want[ed] it." She said she did and he removed his penis from his pants. The victim performed oral sex on defendant. Then they had sexual intercourse. Afterward, defendant inserted a vibrator into the victim's vagina.

The police were notified that a 14-year-old female was engaged in a sexual relationship with a 28-year-old male. The victim and her father responded to the police station.

Defendant was arrested at his workplace. He acknowledged picking up a female he met on a "dating app," driving her to an unknown location, and having oral and vaginal sex in his vehicle, but he said he thought she was 18 years old.

On June 13, 2017, defendant was charged by amended complaint with unlawful sexual intercourse with a minor more than three years younger than himself (Pen. Code,

§ 261.5, subd. (c);¹ count 1), oral copulation with a minor under the age of 16 (§ 288a, subd. (c); count 2), and sexual penetration with a person under the age of 16 (§ 289, subd. (i); count 3)

The same day, defendant pled no contest to count 1, unlawful sexual intercourse with a minor more than three years younger than himself.

On August 15, 2017, the trial court granted defendant three years' probation with a year in custody, and ordered him to register as a sex offender pursuant to section 290.006.

On August 21, 2017, defendant filed a notice of appeal.

DISCUSSION

I. Law

In imposing discretionary registration pursuant to section 290.006, “the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197, overruled on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888 (*Johnson*).)

“In order to make a discretionary determination as to whether or not to require registration [under section 290.006], the trial court logically should be able to consider all relevant information available to it at the time it makes its decision.” (*People v. Garcia* (2008) 161 Cal.App.4th 475, 483, disapproved on another ground in *Johnson, supra*, 60 Cal.4th at p. 888 & disapproved on another ground in *People v. Picklesimer* (2010)

¹ All statutory references are to the Penal Code.

48 Cal.4th 330, 338-339, fn. 4.) “One of the purposes of the sex offender registration requirements ‘ ‘ ‘ “is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]” ’ ’ [Citations.]’ [Citation.] Where registration is discretionary, then, one consideration before the court must be the likelihood that the defendant will reoffend.” (*People v. Garcia, supra*, 161 Cal.App.4th at pp. 484-485; see *People v. Thompson* (2009) 177 Cal.App.4th 1424, 1431, disapproved on another ground in *Johnson, supra*, 60 Cal.4th at p. 888.) The facts supporting registration need be proved only by a preponderance of the evidence. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1063-1065.) Further, “[a] trial court is not required to accept even unanimous expert opinion at face value. [Citation.] As long as the decision to reject such testimony is not ‘arbitrary,’ the trial court may reject the conclusion of an expert.” (*In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.) “ ‘Where there are no express findings of fact, it is implied that the trial court ... made whatever findings were necessary to support the judgment or order.’ ” (*People v. Fulkman* (1991) 235 Cal.App.3d 555, 560.)

We review a trial court’s order imposing discretionary registration for abuse of discretion. “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

II. Background

The probation officer’s report noted that defendant had a low risk assessment score and no prior criminal record. The officer recommended three years’ probation with one year in custody.

Defendant submitted a letter to the trial court, discussing his family support, his employment, his recent religious development, and his remorse. The trial court added its handwritten comments to the letter: “Last paragraph refers to asking for forgiveness

from God and being filled with remorse—no mention of the victim—he refers to being ‘accused’ of this. Not a very insightful letter.”²

The psychologist’s report noted that defendant explained he thought the victim was 18 years old, and he did not find out she was only 14 until he was arrested. The report stated defendant’s Static-99R score of 2 placed him in Risk Level III, Average Risk for sexual recidivism, which converted to a risk of between 4.8 and 6.5 percent during five years in the community. Defendant’s LSI-R score placed him in the Low Risk/Needs category for general criminal recidivism, which converted to a risk of 11.7 percent during one year in the community. The psychologist opined that, in light of defendant’s average risk of sexual recidivism and low risk of general recidivism, he should be released on probation with light treatment services. In addition, he was not diagnosed with a psychological problem that would increase his risk. On the psychologist’s report, the trial court wrote: “Not all that helpful—[the psychologist] barely discusses the facts like defendant picking [the victim] up at a location away from her house and the use of a vibrator.”

At the sentencing hearing, the parties presented their arguments, as follows:

“[PROSECUTOR]: Your Honor, ... we are asking for the two-year term. We are asking for the registration under Penal Code Section 290, based on the fact that the disparity in age is 28 and 14. Apparently this particular defendant was speaking with the named victim via the social media app, lured her out of the house and with that we’ll submit.

“THE COURT: All right. [Defense counsel], do you want to be heard?

“[DEFENSE COUNSEL]: Yes, your Honor. We are asking that the court not impose [section] 290 registration. I think most notably from the [section] 288 evaluation, the doctor did not make it terribly clear as to whether or not to impose [section] 290 registration, however she did make it abundantly clear that with [defendant]’s low risk and he’s a low risk

² The trial court’s written comments are dated and initialed.

offender and the greater the court forces him to do certain things, sexual offense treatment, things of that nature it actually makes someone of this nature more inclined to commit offenses in the future. I think given the fact he's a low risk offender, this was clearly a one[-]time mistake, he met—they met on an app called [W]hisper. [Defendant] was very clearly upset when he found out the age, he did not know the age of the girl and I think the most notable line in the report is the fact that he felt ill from the fact that his sister is 13. [Defendant] shows no indication that he has any history of any sexual deviance. In addition to that, he has absolutely no criminal history whatsoever. He was working at the Senior Citizen Center before this act occurred. It was a one[-]time incident and the fact that probation is not recommending a [section] 290 term in addition to the fact that probation is also recommending no initial state prison, I do not think that [section] 290 registration would be appropriate for someone in [defendant]'s position. For those reasons we are asking that the court use its discretion and not impose [section] 290 registration on [defendant]. In addition to that, we are supporting probation's recommendation of no initial state prison. [Defendant] is eager to do probation. There's nothing to indicate he would not be successful on probation given the fact that he was full-time employed, he has a place secured, housing and he has family members who are willing to assist him in the transition with probation and we would also be asking for credit for time served in this matter but we do understand that the court is inclined possibly to give a 364 day term.

“THE COURT: [Prosecutor], do you want to be heard any further?

“[PROSECUTOR]: Just briefly, Your Honor. Facts from the named victim states she advised she was 16 years old during their initial conversation when they first met up she then admitted to being 14 and just before they had sex he asked her if she was actually only 14. When she confirmed she was, he went ahead and did it anyway. Apparently there was still some contact between the two of them after this particular meet-up over the same chat app.

“THE COURT: Matter submitted?

“[DEFENSE COUNSEL]: Submitted, Your Honor.

“THE COURT: All right. The confidential victim in this case was 14 years old. She began texting the defendant who was 28 through this app called [W]hisper. Initially the confidential victim said she was 16, then she told the defendant she was 14 according to the probation report. They texted for about one month. In mid[-]March of 2017, the defendant picked up the confidential victim in his vehicle down the street from her home. He

drove her to an orchard. The defendant inquired of the confidential victim did she want it and placed her hand on his penis. She said yes. He withdrew his penis. Confidential victim orally copulated the defendant. They then had vaginal intercourse with the defendant ejaculating on the back seat of the vehicle. The defendant then placed a large pink thing referred to by Dr. Hughes as a vibrator that resembled a bullet into the confidential victim's vagina.

"The defendant was arrested on the 12th of April. Under [*Miranda*] admissions, he admitted sex but claimed he thought she was 18. The Probation Department report opines that the defendant's eligible for probation and they're recommending a probationary term. They're also recommending the court make a finding of whether as a condition of probation the defendant should be ordered to register under Penal Code [s]ection 290. The court makes a finding that [section] 290 registration is appropriate in this case and I'm ordering the defendant to register under Penal Code [s]ection 290 for the following reasons. I am making a finding that the offense was committed as a result of sexual compulsion for the purpose of sexual gratification. The defendant admitted that as much in the Probation Department report. The reason[s] that I'm ordering registration are as follows: He did pick this individual up, not at her home but down the street. To me that indicates—pretty good indication he knew that she was under age. In addition, there were not only acts of oral copulation and intercourse, he also inserted an object into this young girl's vagina after he had committed acts of sexual intercourse and oral copulation. For those reasons I'm ordering [section] 290 registration. [Defense counsel], did you have a comment you wanted to make?

"[DEFENSE COUNSEL]: Yes. One of the reasons the court has stated on the record for ordering [section] 290 registration is the fact that [defendant] picked up the girl away from her house but I believe and the [prosecutor] can correct me if I'm wrong, he did drop her off in front of her house which would indicate that the being out farther away from her house had nothing to do with her age. It would be consistent if he was trying to hide it from her parents he wouldn't drop her off in front of the house.

"THE COURT: All right. You're entitled to your opinion. Anything else you wanted to say? Primarily what I'm relying on is the fact that after sexual intercourse and oral copulation, the defendant decided to insert a[n] object into this young girl's vagina.

"[DEFENSE COUNSEL]: And I understand that that can be concerning but the fact that he met her on an application on the Internet called [W]hisper and he believed that she was over 18.

“THE COURT: I don’t believe that for a second.

“[DEFENSE COUNSEL]: Well, I think it’s inappropriate that a young girl would be asking for sex on a dating app called [W]hisper.

“THE COURT: I wouldn’t disagree with you but he’s 28 at the time. She’s 14. I am making a finding that the defendant is required to register under Penal Code [s]ection 290.”

III. Analysis

Defendant contends the trial court abused its discretion when it ordered him to register because insufficient evidence supported a finding that he was likely to reoffend. The People counter that defendant forfeited the claim by failing to object on this ground. We conclude defense counsel’s argument that registration was inappropriate because defendant was a low-risk offender, had no history of crime or sexual deviance, and had simply committed a one-time mistake was sufficient to preserve the issue of likelihood of reoffense for appeal.

On the merits, we conclude sufficient evidence supported the trial court’s implied finding that defendant was likely to reoffend. The court found that defendant knew the victim was only 14 years old before he engaged in sex acts with her. And the court’s repeated comments regarding defendant’s bringing a vibrator demonstrate it found defendant had planned and prepared to commit multiple offenses on the underage victim, making the crimes more egregious. Although the court did not expressly state it found defendant likely to reoffend, the evidence supports the conclusion that defendant groomed the 14-year-old victim (who was 14 years his junior) by communicating with her for an extended period of time, until she agreed to meet him. Then he planned a secret pick-up location away from parental view, prepared for and committed multiple sex offenses, all while knowing the victim was under age. After he was arrested, he denied knowing the victim’s age and failed to take responsibility for the offenses. The court noted that defendant’s remorse appeared to be connected to accusations against him rather than crimes he committed against the victim. In sum, the court could reasonably

conclude these factors—the grooming, planning, awareness, secrecy, multiple offenses, denial, and lack of remorse—would increase defendant’s risk of reoffending, despite the psychologist’s opinion, which the court considered, but was not obligated to follow. The court’s comments demonstrate the court implicitly considered, and then found, a likelihood defendant would reoffend. Based on this evidence, we cannot say the court abused its discretion when it ordered defendant to register under section 290.006.

DISPOSITION

The order requiring defendant to register pursuant to Penal Code section 290.006 is affirmed.